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## A PRELIMINARY STUDY OF THE ADMINISTRATIVE POLITY OF NAPOLEON I.<sup>1</sup>

It is somewhat remarkable that while Napoleon Bonaparte has always been recognized as the chief architect of the modern French state, his plans and specifications, so to speak, and the actual process of his direction of the construction, have been as yet but slightly studied. The general effect has been closely examined and variously appraised, and certain phases, such as the church, education, finance and industry, have been subjected to expert scrutiny; but I am not aware of any thorough and comprehensive inquiry into the principles and practices of general administration from the point of view of the shaping of the new institutions. Yet such an inquiry must be admitted to be essential to the comprehension both of the man and of his work.

I am not unmindful of the careful attention that has frequently been given to the fundamental documents of the new régime. But here, as so often in the study of the history of institutions, it seems necessary to call attention to the importance of closely following the daily executive interpretation of such documents, the daily course of their application in connection with the problems of civil government. Institutions are after all manipulated by men and for men, and when we lose sight of this flesh-and-blood element, we deal only with dry bones. It is through the constant contact of these bones with flesh and blood that the body's habit and action, the organic life, is determined. From this point of view I have entered on the study of the aims and methods of Napoleon Bonaparte in the administration of the government of France and of their working out in civil institutions.

Napoleon is one of the great administrators of all time, and his

<sup>1</sup> The material made use of in this paper is drawn from the authorized *Correspondance de Napoléon Ier* (Paris, 1858-1870, 32 vols.), with the supplements of Lecestre, *Napoléon Ier, Lettres Inédites, an VIII-1815* (Paris, 1897, 2 vols.), and De Brotonne, *Lettres Inédites de Napoléon I.* (Paris, 1898) and *Dernières Lettres Inédites de Napoléon I.* (Paris, 1903, 2 vols.), from the Rondonneau Collection of *imprimés* in the Archives Nationales, from the *cartons* of the Arch. Nat. entitled "Journaux du Cabinet de l'Empereur, an VIII-1815" (AF IV. 909), and "Dictées de l'Empereur au Ministre Sec. d'État, an XII-1815" (AF IV. 910), and from the *registres* containing the "Procès-verbaux des Séances des Consuls, 1800-1804" (AF\* IV. 3-15). The authorized *Correspondance* will be referred to as *Corr.*, the supplements under the names of the editors.

work crystallizes the results of the most striking period of transition in modern history; a close study of the progress of that work seems to me the most effective way of dealing with the problems of the meaning and results of the French Revolution, and of the relations to it and to the Old Régime of modern France and modern Europe. The present brief paper aims to do little more than set forth certain preliminaries to such a study; it is concerned with principles and purposes rather than achievements, and deals with only certain phases of the spirit and tendencies of the Napoleonic government. For the most part, I have left Napoleon to speak for himself, and have neglected, as often open to suspicion, most of his public utterances, and all statements and explanations made apart from the course of normal civil administration. I have therefore confined myself to such more or less confidential communications as can hardly be supposed to have been affected by the idea of publicity, present or future; for lack of space I have left aside for the present all legislative work. The confidential communications used are, it will be noticed, for the most part such as present administrative decisions; they represent therefore not only what Napoleon said but what he did. In grouping them I have aimed to confine myself to two general aspects: (1) the enunciation or indication by Napoleon of political principles or administrative methods; (2) the legality or constitutionality of his régime. And I should be the first to concede that the material presented is quite fragmentary, that for the most part it raises questions without furnishing those conclusive answers that can rest alone on more extended work.

## I.

It is not possible, I think, to present any comprehensive view of society or politics from the utterances of Napoleon; but the student will hardly doubt that he not only had the born ruler's intuition, but had reflected deeply on the general problems of government. Both intuition and reflection doubtless lie behind a couple of interesting remarks on the Art of Ruling that belong to the year 1804. They are made to Fouché, to whom on September 9 he writes with respect to a recent production by Barère entitled *Lettre à l'Armée*; he says that he has not read it as it was both improper and futile, and that Barère, "dont les déclamations et les sophismes ne sont pas en harmonie avec sa colossale réputation", is to be warned not to meddle with such matters. "Il croit toujours", adds Napoleon, "qu'il faut animer les masses; il faut, au contraire, les diriger sans qu'elles s'en aperçoivent."<sup>2</sup>

<sup>2</sup> *Correspondance*, IX. 511.

A few weeks later he remarks, à propos of the "amnistiés" (probably the returned *émigrés*), "Dans les gouvernements, il faut de la conséquence; du moment qu'on admet un individu à faire partie de l'ordre politique, il doit en posséder tous les droits. . . . L'art des gouvernements est de punir les méchants, mais de récompenser les honnêtes gens. . . . Le principe général est de tenir tout en surveillance, et de faire des exceptions en faveur de ceux qui se comportent bien."<sup>3</sup> This observation has a collateral interest, and suggests the remark that Napoleon was not always able to display that "conséquence" which he recognized as a prime virtue of the ruler; in regard to the *émigrés*, for example, he might seem to have spoiled his own work in large degree by failing to follow up his early generous and statesmanlike policy. But instead of causing us simply to view Napoleon's professions with suspicion, this should perhaps lead us to recognize what is often ignored: that the conciliatory advances of the new government were for the most part futile, that it was forced constantly to regard itself as surrounded by irreconcilable enemies, and that from this and other causes the administrative conditions never became entirely normal.

The memoirs and other personal fragments of this period frequently represent Napoleon as discoursing freely on revolutionary questions and on his own position in France. Such records unfortunately are open to much suspicion from the uncertainty both as to Napoleon's immediate object or dramatic instinct, and as to the narrator's good faith or good memory. It is but rarely that direct reference is made to such fundamental matters in the administrative correspondence. The first instance is perhaps in 1802, when he begins the life consulship with the declaration to the Senate that "Le suffrage du peuple m'a investi de la suprême magistrature. Je ne me croirais pas assuré de sa confiance, si l'acte qui m'y retiendrait n'était encore sanctionné par son suffrage."<sup>4</sup> When his dignity was made imperial and hereditary, his public language shows the change, and he declares to the Senate, April 25, 1804, "Nous avons été constamment guidés par cette grande vérité: que la souveraineté réside dans le Peuple français, en ce sens que tout, tout sans exception, doit être fait pour son intérêt, pour son bonheur et pour sa gloire."<sup>5</sup> It is evident that this guarded statement may mean no more than the motto of Frederick the Great's despotism, "I am the first servant of the State", and the purport of it will be the more evident when it is remembered that it occurs in the response to that

<sup>3</sup> *Corr.*, X. 15.

<sup>4</sup> *Ibid.*, VII. 460.

<sup>5</sup> *Ibid.*, IX. 341.

address in which the Senate had declared that "Il faut que la liberté et l'égalité soient sacrés, que le pacte social ne puisse pas être violé, que la souveraineté du peuple ne soit jamais méconnue, et que la nation ne soit jamais forcée de ressaisir sa puissance et venger sa majesté outragée."<sup>6</sup> By 1812 the Emperor seems to have reached the point of open hostility to the idea of popular sovereignty, or perhaps rather to any expression of that idea, for on December 20 he breaks out in his reply to an address of the Council of State:

C'est à l'idéologie, à cette ténébreuse métaphysique qui, en recherchant avec subtilité les causes premières, veut sur ces bases fonder la législation des peuples, au lieu d'appropriier les lois à la connaissance du cœur humain et aux leçons de l'histoire, qu'il faut attribuer tous les malheurs qu'a éprouvés notre belle France. Ces erreurs devaient et ont effectivement amené le régime des hommes de sang. En effet, qui a proclamé le principe d'insurrection comme un devoir? qui a adulé le peuple en le proclamant à une souveraineté qu'il était incapable d'exercer? qui a détruit le respect et la sainteté des lois, en les faisant dépendre, non des principes sacrés de la justice, de la nature des choses et de la justice civile, mais seulement de la volonté d'une assemblée composée d'hommes étrangers à la connaissance des lois civiles, criminelles, administratives, politiques et militaires?<sup>7</sup>

It is not necessary for me to delay upon the character and history of the representative bodies of the Napoleonic period; it is probably just enough to regard them as innocuous if not farcical. The Emperor's real attitude with respect to parliamentary representation is probably accurately expressed in a note for Cambacérès, October 28, 1809, by the remark with reference to the Corps Législatif, "Aucun corps ne peut se dire représentant de la nation. Toutes les autorités la représentent également."<sup>8</sup> We can hardly doubt that Napoleon dreaded the institution and resented its claims, and we cannot be surprised that he should have both dreaded and resented claims so closely identified with ten years of excess and disaster. And in judging his attitude toward alike the theory of popular sovereignty and its expression in parliamentary institutions, we must remember (as Napoleon III. urged) that government in his brief reign can hardly be looked at as ever reaching normal conditions, and that he might well have continued to believe throughout the most of it that the task of establishing order and winning men from the revolutionary temper and from the dangerous brooding on revolutionary ideas and activities, would be fatally hampered by freedom of political association and agitation. We have evidence that Napoleon as an observer of the revolutionary popular move-

<sup>6</sup> March 27, 1804.

<sup>7</sup> *Corr.*, XXIV. 343.

<sup>8</sup> *Ibid.*, XX. 16.

ments had received impressions that left him somewhat nervous with respect to such movements. Some peculiarities in his treatment of Paris were largely the result of this sentiment, and its existence probably had much to do with his constant vigilance as to Parisian and provincial public spirit and with his unremitting efforts to repress all mediums of the interchange of ideas on public affairs.

But whether or not he were permanently or only temporarily hostile to representative government, he recognized the necessity of keeping constantly in touch with public opinion and of remaining the exponent of national feeling. In this way he represents clearly one of the great changes that had come about, the larger place taken by public opinion and national sentiment. He undoubtedly looked upon himself as receiving his power from or with the approval of the nation, and as remaining dependent upon that approval; that he ever felt himself to be in the position of the hated tyrant, to be estranged in spirit from and physically set over against his people, I do not believe. In this connection one might quote some sentences in a note for Cambacérès of August 2, 1809. After speaking of the inadvisability of "*les choses masquées*" in administration, he goes on to sweep away the artificial construction of the "*imperial domain*" as composed of "*contributions levées sur l'ennemi*" with the remark that "*cette affectation si positive d'une chose appartenant à l'Empereur et non à la nation était un peu trop tranchante, car l'Empereur ne fait la guerre qu'avec les moyens et l'argent de la nation.*" And he adds:

Toutes les fois que dans une loi ou sénatus-consulte on voudra donner à l'Empereur des propriétés autres que sa liste civile et ses acquisitions, on trouvera des embarras et des contrariétés. Mais toutes les fois qu'on le chargera d'administrer ou de réglementer telle partie, on sera d'accord. . . . L'Empereur ne peut donner un seul arpent du domaine national, ni même du domaine de sa liste civile. Établir le contraire ce serait aller contre tous les principes.<sup>9</sup>

This recognition of the identity of crown and people should be viewed in the light of his efforts in various ways to get into and keep in touch with the nation. He was determined to retain control as well as initiative, and to crush every effort at popular agitation; but he was also sincerely anxious to get such information and advice as would enable him to act in the general interest. This is, I think, the predominant idea in the institution of the *senatoreries*, through which a number of the senators (who were constitutionally excluded from open political or administrative activity) were peri-

<sup>9</sup> *Corr.*, XIX. 295.

odically employed in secret investigations of conditions in specific territories; as explained by Regnaud in 1803 to the Corps Législatif, this institution was intended to aid in bringing the Senate closer to the nation, in placing before the government the public needs and ideas, and in enabling the public to know "la véritable pensée du gouvernement".<sup>10</sup> The same purpose was claimed in the institution of the Legion of Honor, which is referred to in the Minutes of the Council of State of the 25 Floréal an X as "une institution politique qui place dans la société des intermédiaires par lesquels les actes du pouvoir sont traduits à l'opinion avec fidélité et bienveillance, et par lesquels l'opinion peut remonter jusqu'au pouvoir."<sup>11</sup>

These facts should be kept in mind when we reflect upon the well-known process of the purging of the Tribune and Senate and the final suppression of the former. The Corps Législatif was not so much interfered with; that Napoleon, however, cannot justly be accused of holding out false hopes to it may be seen from the expressions used when, on the 24 Frimaire an XII, the Senate decreed new regulations for its organization and operation. One of these was that the First Consul should appoint the annual president (formerly elected monthly) from candidates nominated to him by the assembly; in stating the reasons for this change Regnaud declared that the government encouraged all communications from the Corps Législatif, and aimed to assure to it "la liberté d'une discussion éclairée . . . la faculté d'adresser au Gouvernement l'expression de ses sentiments, le résultat de ses pensées, de manière à éclairer, encourager sa marche, sans pouvoir la retarder et l'arrêter jamais; et il lui laisse tout entière l'obligation de se soumettre au régulateur souverain qui commande à toutes les autorités et balance tous les pouvoirs, à l'opinion publique."<sup>12</sup>

It seems clear from all this that Napoleon looked upon the central representative institutions as proper (in at least the conditions then confronting government in France) only to furnish light to an all-powerful and responsible executive. It is not to be expected that he would view otherwise the functions of the representative bodies that acted locally. In considering these we perhaps need not stop to distinguish between the advisory councils of the communes, *arrondissements* and departments, occupied with questions of local administration, and the electoral colleges in the *arrondissements* and departments that took the place of the original "lists

<sup>10</sup> Archives Nationales, AD XVIII<sup>B</sup>. 314.

<sup>11</sup> *Ibid.*, VI. 80.

<sup>12</sup> *Ibid.*, XVIII<sup>B</sup>. 314.

of notabilities"; there is little difference with respect to popular election (practically excluded after 1802), and all, as composed of residents, are alike representative of local public opinion and interests. None of these local organs appears to us as dangerous, but yet we find Napoleon exercising constant vigilance in their regard. September 17, 1801, he comments upon the unsatisfactory character of the recent sessions of the departmental councils, as wholly occupied with local and personal matters, and declares that in the next session it will be necessary "de leur indiquer, par une instruction, les objets principaux sur lesquels doivent porter leurs délibérations".<sup>13</sup>

If it is natural to suspect that he is simply seeking a pretext for increasing the subjection of these bodies, we must at least concede that he drew a line with regard to the kind of control, for on May 24, 1804, he expresses strongly his disapproval of the intimidating action of one of the military commanders in regard to an electoral college, and especially "qu'une assemblée toute civile ait été environnée de troupes". He informs the Minister of the Interior, to whom he is writing, that "Les maximes du Gouvernement sont entièrement contraires à cette mesure; il ne désire régner que par la confiance, et il n'a jamais voulu qu'on pût mettre des bornes à la libre expression des citoyens appelés aux fonctions électorales."<sup>14</sup> In March 1805, after the institution of the Legion of Honor and the provision for the *ex-officio* sitting of legionaries in the electoral colleges, he writes to confine to one-tenth the proportion of such members.<sup>15</sup> His constant care to prevent the development of a dangerous public spirit through these assemblies is shown, March 27, 1805, in his directions to the Minister of the Interior with respect to the convocation of the cantonal ones. Contiguous departments are not to be allowed to hold such meetings at the same time; "Le ministre fera un rapport sur l'esprit qui a animé l'année dernière les collèges qui viennent d'être convoqués, afin que l'on puisse, en usant de la prérogative qui appartient à l'Empereur, rétablir l'équilibre."<sup>16</sup> In the following year there were issued new "Instructions pour Messieurs les Présidents des Collèges Electoraux", in which it is directed that "le collège ne peut directement ni indirectement sous quelque prétexte que ce soit, correspondre avec un autre collège, sous peine de dissolution."<sup>17</sup>

<sup>13</sup> *Corr.*, VII. 254.

<sup>14</sup> *Ibid.*, IX. 370.

<sup>15</sup> *Ibid.*, X. 203.

<sup>16</sup> *Ibid.*, X. 265.

<sup>17</sup> *Arch. Nat.*, AD I. 73.

This is, of course, only a part of a general policy of repression with respect to public movements or expressions of public spirit that has been frequently dwelt upon. It is true that June 7, 1800, Napoleon wrote from Italy to the other consuls in disapproval of the suppression of a journal for reflections on the Institute, and remarks, "il doit régner la plus grande liberté";<sup>18</sup> but this temper did not last long and all that remained of journalism was placed soon under a reign of terror. Official displeasure was constantly visited on any sign of appealing to the public through the press in regard to public affairs. March 26, 1806, the Emperor requests the Minister to inform the Chambers of Commerce that "la voie la plus inconvenante et la plus inefficace de faire parvenir à Sa Majesté ou des vues, ou des représentations, est celle de l'impres-sion. Une chose imprimée, par cela même qu'elle est un appel à l'opinion, n'en est plus un à l'autorité."<sup>19</sup> In a letter to Champagny, Minister of the Interior, April 26, 1806, with respect to a municipal official whom the prefect had charged with insubordination, he declares that the charge could be regarded as serious only if the accused had published his remonstrance, in which act would lie "son tort le plus réel".<sup>20</sup> About the same time he announces limitations on the access to the government of deputations, declaring that they could be sent only by the electoral colleges or by the municipal and departmental councils, acting in a prescribed way. In June of the same year he writes to Eugene Beauharnais, Viceroy of Italy, "Mon fils, il faut imprimer peu. . . . En général, le moins que vous ferez imprimer sera le mieux."<sup>21</sup>

The subject of local representative institutions suggests the large topic of local autonomy *vs.* centralization. This issue can hardly be said to be raised directly in official communications, and, as we should expect, the whole trend was toward a centralization which at that time might well have appeared the only promising line of development. But yet we have some evidence that Napoleon was not wholly responsible for the excess of this development or blind to its dangers. If we can rely on a note dictated by him to Lucien Bonaparte when appointed Minister of the Interior at the beginning of the consulate, Napoleon began his administration strongly convinced of the evils of excessive centralization and anxious to maintain considerable local autonomy. The note<sup>22</sup> refers with approval

<sup>18</sup> *Corr.*, VI. 343.

<sup>19</sup> *Ibid.*, XII. 218.

<sup>20</sup> *Ibid.*, XII. 311.

<sup>21</sup> *Ibid.*, XII. 478.

<sup>22</sup> *Ibid.*, VI. 50. The document is published in the official *Correspondance* as an extract from the *École des Communes*; no treatise of this title appears elsewhere.

to the early revolutionary policy in regard to the communes, says that since 1790 the commune that before had belonged to the seigneur and the priest had been "*une véritable personne, ayant droit de posséder, d'acquérir*", but adds that since 1790 also these 36,000 communes had been pillaged by the government, that in ten years more they would be reduced to beggary, and that it is the duty of the minister to avert an evil "*qui porterait la gangrène dans ces trente-six mille membres du grand corps social*". An inventory is therefore to be made with special reference to communal conditions, and every official effort is to be given to preserving the *biens communaux* and to general improvement; ten years of such a régime would, it is predicted, leave in France only "*communes ayant des ressources disponibles*", and the general movement of prosperity given to the country by the activity of thirty-six million individuals would be multiplied "*par la puissance amélioratrice de trente-six mille individualités communales agissant toutes sous la haute direction du Gouvernement*".

This last clause, it will be noticed, is somewhat ominous; the extent and the exact method of the exercise of "*la haute direction*" were probably not easily determined, for there followed a good deal of experimentation with respect to the supervision of the communes. The constitutional changes of 1802 and 1804 greatly advanced the process of stifling local initiative and freedom of action; it is hence rather surprising to find on October 27, 1804, a doubt addressed by Napoleon to the Council of State with reference to the project of making *maires* and their adjoints a part of the municipal councils. "*Comment*", he asks, "*accorde-t-on cette mesure avec le droit de surveillance du conseil sur l'administration de la municipalité?*"<sup>23</sup> And it was not until June 4, 1806, that it was declared by decree that for the future the *maire* should sit in and preside over the council.<sup>24</sup>

The treatment of the communal properties in the later years of the Empire was no doubt in large degree the natural or inevitable result of Napoleon's financial difficulties; for the policy outlined with such enthusiasm in 1800, there is substituted an effort to shift public burdens from the central to the local administrations, and to appropriate for the state the resources of the communal lands. A note for the Minister of the Interior, September 17, 1810, dwells on the desirability of thus increasing the communal obligations, declares that the communes "*sont, en général, trop riches*" and are extrav-

<sup>23</sup> *Corr.*, X. 36.

<sup>24</sup> These councils it will be remembered were nominated by the prefects.

agantly managed, the *maires* (who ought not to be paid at all) sometimes receiving more than the prefects; the minister is therefore directed to prepare a project for a law under which the communes should abandon to the state one-half of the *octrois* in order that direct taxation might be reduced. We find Napoleon carried on in this direction even beyond the docility of the Council of State; for June 26, 1813, he writes from Dresden to the imperial arch-chancellor, Cambacérès,<sup>25</sup> that if the council continues to retard by a "foule de questions contentieuses" the sale of the communal properties the matter is to be removed from it altogether and managed by the Arch-Chancellor, the Minister of Justice and the Grand Judge. He declares that the communes are to be left only "les objets d'agrément". That this, however, was an exceptional war-measure is indicated by the remark: "Il importe, dans la situation actuelle des affaires, de soutenir le Trésor; tout le reste est indifférent." This step is further pushed on in a letter to Gaudin, Minister of Finance, of the following July;<sup>26</sup> he asks for the names of the departments in which communal properties have not already been taken possession of, and adds that, as the new financial arrangements will now enable these also to be sold, the process is to be extended to them.<sup>27</sup>

This summary of Napoleon's treatment of the principle and practice of popular sovereignty will show how far he had wandered from the rationalistic positions of the men of the eighteenth century and of the Revolution, and may seem to justify Taine's remark that he entertained only disgust for the revolutionary ideas and principles. But a very little investigation shows that this is distinctly something less than a half-truth. Without going fully into the question of how far Napoleon really shared the revolutionary ideas or how far he consciously carried on or opposed the revolutionary work, I will point out some evidence of a consistent effort on his part to identify himself and his régime with the previous epoch. It is, of course, advisable to formulate a general caution as to the degree in which he may be suspected of simply echoing the current or lately prevailing cant; it is probably true that he was slow in emancipating himself from the idea that it was advisable to use it. But with the fullest allowance of this kind it must still, I think, be concluded that Napoleon Bonaparte so far continued to share the

<sup>25</sup> *Lecestre*, II. 253.

<sup>26</sup> *Corr.*, XXV. 477.

<sup>27</sup> The large question of the *biens communaux* is only touched on in the above remarks. Many other elements were involved; but an adequate discussion of them is at present impossible.

revolutionary attitude and uphold the revolutionary work as to set him and his government at a long distance from the Old Régime.

The revolutionary abolition of feudal obstacles to the well-being of the masses and to the effective use by the state of the national resources, is frequently referred to by Napoleon with the most emphatic approval; in this, however, both he and the revolutionists were only in line with the policy of the eighteenth-century enlightened absolutism. July 18, 1801, the consuls issued a proclamation "aux habitants des quatre départements de la rive gauche du Rhin", in which the newly incorporated Alsatians and Lorrainers are forcibly reminded of all they had won.

Des privilèges odieux n'enchaînent plus l'industrie des ouvriers; le gibier ne ravage plus les champs du cultivateur, ne dévore plus les fruits de son travail; pour tous ont cessé d'avilissantes corvées; pour tous a cessé la dégradation des servitudes féodales.

La dîme est abolie; les contributions de tous genres sont adoucies; les perceptions sont également réparties entre les terres du seigneur ou de l'ecclésiastique ci-devant exempts de charges, et celles du particulier qui les supportait seul; les douanes intérieures qui se rencontraient au passage d'une contrée à une autre, ou empêchaient de remonter les rivières, sont supprimées.

Une justice impartiale, des administrations régulières sont substituées à l'autorité arbitraire des baillis.<sup>28</sup>

On January 19, 1803, Napoleon questions the Minister of Justice with respect to the full abolition of feudal conditions in these departments and in the Netherlands.<sup>29</sup> It has been frequently pointed out that the extension of his power was always marked by these changes, and it is not now necessary for me to delay on the fact that the application of such measures was apparently in course of modification at one time in the later years of the Empire in the interests of the revenue.<sup>30</sup> For at the end of 1811 we find adherence to the

<sup>28</sup> *Corr.*, VII. 198.

<sup>29</sup> *Ibid.*, VIII. 183.

<sup>30</sup> I refer here to a phase of this matter on which my material is as yet incomplete and which is not represented at all, I think, in the published documents. The *carton* of the National Archives entitled "Journaux du Cabinet de l'Empereur, an VIII-1815" (AF IV. 909) contains the following "Note dictée par l'Empereur au Prince Cambacérès du 9 novembre 1810":

"Sa Majesté desire que le Prince Cambacérès fasse venir près de lui MM. les Comtes Treillard et Merlin, confère avec eux sur les objets ci-après et présente à S. M. les idées sur les mesures qu'on peut être dans le cas d'adopter.

"Le système féodal a été aboli en France. Il ne peut être question de revenir sur cette partie de notre législation pour ce qui concerne l'ancienne France et les pays anciennement réunis. Doit-elle être appliquée aux Départemens de hollande? à ceux des États romains? à ceux de la Toscane? et ne peut-on pas aussi en excepter Ceux de Piémont, si l'état des choses le permet encore? Cet objet est tres digne d'attention. le resultat de la Suppression des Droits féodaux

revolutionary principles sufficiently set forth anew in the decree for the abolition of the feudal régime in the newly-incorporated North-west Germany.<sup>31</sup>

An emphatic general approval of the nationalizing effects of the revolutionary measures is contained in a letter of the First Consul to Cambacérès, November 3, 1802. It is written from Rouen and dwells on the good conditions prevailing in the town.

Sa prospérité s'est accrue d'un tiers depuis 1788. Il y a dans tout ce département un attachement au Gouvernement, franc et dégagé de toute autre pensée. On y retrouve les avantages de ce système de 1789 qui avait armé la nation entière et l'avait réunie dans le même mouvement. Depuis le négociant ou le fabricant le plus riche, et qui, pendant la révolution, ont eu le plus la réputation d'aristocratie, jusqu'au dernier homme du peuple, ils sont tous réunis.<sup>32</sup>

In 1803 we find the First Consul vigorously denouncing a book that had defamed the Revolution and being led by the incident to increase the stringency of the press censorship.<sup>33</sup> In 1807 he writes to the president of the Section of the Interior of the Council of State to condemn an order against the civilian bearing of arms issued by a military commander engaged in suppressing brigandage; he points out the lack of authority of either a military commander or a prefect to so restrict the rights of the citizen, and concludes with language that under more public conditions would be open to suspicion: "Tout noble était autrefois en possession de ce droit; aujourd'hui tout Français domicilié, tout citoyen qui, dans son ex-

dans ces pays serait en meme tems, une perte considerable pour l'Etat et la ruine de beaucoup de Particuliers, Sans aucune autre motif et sans aucune autre avantage que de depouiller Ceux qui jouissent pour libérer les debiteurs des obligations qui leur ont été imposées de tout tems. Un rapport est necessaire pour concilier avec le Code napoleon les modifications qu'il convient de faire de nos lois dans ces differents pays. Deja le Conseil d'Etat, en délibérant sur les lois à publier dans les Departemens de la Hollande s'est refusé à comprendre dans la Nomenclature proposée les lois sur la suppression des Droits féodaux. Il y a sur cet objet essentiel un travail très utile à faire. En interprétant les Decrets de l'assemblee constituante de manière à déclarer féodales propriétés qui n'étaient pas, mais qui étaient seulement frappées d'un Cens, on a obéi à la Politique et le Trésor a perdu une centaine de Millions. Il n'y a aucun Raison pour le soumettre à cette perte dans les nouveaux Departemens."

On the same date a similar but more extended communication was dictated for the Secretary of State, going more fully into the ways in which the treasury had suffered, and repeating almost verbatim the above sentences. It is not, however, probable that further research into this matter would reveal any other than financial motives. And it is, of course, entirely true that both the state and the legitimate rights of private property had been largely and unnecessarily injured in the too hasty and sweeping measures of the Revolution.

<sup>31</sup> *Corr.*, XXIII. 62.

<sup>32</sup> *Ibid.*, VIII. 88.

<sup>33</sup> *Ibid.*, VIII. 374.

istence privée, donne à la société une caution de sa conduite, est noble.”<sup>34</sup> The acts and utterances of the Hundred Days are, of course, untrustworthy, but in this connection it may yet be worth while pointing out how constantly he appeals to the Revolution and to his own administration as confirming its benefits; with his earlier acts in mind we can scarcely deny that he might well have made these appeals with sincerity and good conscience. At least he uses no immoderate language when in his proclamation “Aux Habitants des Hautes et Basses-Alpes”, March 6, 1815, he claims that his return “garantit la conservation de toutes les propriétés”, and appeals for their support on the ground that “L’égalité entre toutes les classes, et les droits dont vous jouissez depuis vingt-cinq ans, et après lesquels nos pères ont tant soupiré, forment aujourd’hui une partie de votre existence.”<sup>35</sup>

The revolutionary breaking-down of the Régime of Privilege that is here referred to, was undoubtedly a change that Napoleon had much at heart, and with which he identified himself to the fullest degree. But it was not in the extreme spirit of rationalistic democracy that he regarded this social revolution, and his attitude was probably not any more adapted to please the *sans-culotte* than the aristocrat of the Old Régime. He belongs in spirit emphatically to the bourgeois revolution, and on various occasions dwells with great emphasis and approval upon the leadership thus secured to the middle classes. In March, 1805, he writes to the Minister of Finance with respect to the formation of those lists of the largest tax-payers that were to be the basis of official life. In forming these lists, special attention is to be given, he directs, to such as have more than one-half of their fortunes in *biens nationaux*.

L’intention de l’Empereur est de ne comprendre parmi les 30 plus imposés que des personnes appartenant aux familles les plus considérables par leur existence antérieure et présente, par l’étendue de leurs liaisons de parenté dans le département, par leurs bonnes mœurs et leurs vertus publiques et privées. Quand on dit les familles les plus considérables, on n’entend pas celles qui jouissaient de plus de considération dans l’ancien ordre de choses, à raison de leur extraction, quoique l’on n’entende pas non plus que ces circonstances antérieures doivent les exclure; mais on entend spécialement les bonnes familles qui appartenaient à ce que l’on appelait autrefois le tiers état, partie la plus saine de la population, et que les liens les plus étroits et les plus nombreux attachent au Gouvernement.

Not more than one-sixth of those included should be persons “ayant autrefois joui d’une existence particulière à raison de leur

<sup>34</sup> *Corr.*, XIV. 401.

<sup>35</sup> *Ibid.*, XXVIII. 6.

naissance". How much the Emperor had this policy at heart is shown by the concluding injunction: "La plupart de ces idées devront rester très-secrètes; c'est la pensée tout entière de l'Empereur sur cette matière: aucun acte public, aucune circulaire ne doit la laisser pénétrer."<sup>36</sup> These views are again strongly enunciated in a letter to Jerome Bonaparte of November 15, 1807, accompanying a new constitution for Westphalia. In this the new king is directed to see to it that the Council of State should be mainly non-noble,

toutefois sans que personne s'aperçoive de cette habituelle surveillance à maintenir en majorité le tiers état dans tous les emplois. J'en excepte quelques places de cour, auxquelles . . . il faut appeler les plus grands noms. Mais que . . . dans vos administrations, la plus grande partie des personnes que vous emploierez ne soit pas noble. Cette conduite ira au cœur de la Germanie et affligera peut-être l'autre classe; n'y faites point attention. Il suffit de ne porter aucune affectation dans cette conduite, et surtout de ne jamais entamer de discussions ni faire comprendre que vous attachez tant d'importance à relever le tiers état. Le principe avoué est de choisir les talents partout où il y en a."<sup>37</sup>

This subject leads logically to a study of Napoleon's attitude to the aristocracy, old and new, but manifestly this cannot be attempted here with any thoroughness. There is considerable obscurity and some appearance of inconsistency in Napoleon's acts and expressions in this matter; this probably testifies to long-continued uncertainty in his own mind (perhaps I might even venture to say, to conflict between principle and policy), and also in all likelihood to the forcing of his hand by events. I shall at present confine myself to quoting some sentences which show that in founding a new nobility or in conceding their distinctions to the old, Napoleon never forgot his fundamental system. March 30, 1807, he writes to Louis of Holland of his astonishment at the news that Louis was re-establishing the old Dutch nobility in its titles and privileges. "Comment", he asks, "serait-il possible que vous ayez eu assez peu de discernement pour ne pas sentir que rien n'était plus funeste à vous, à vos peuples, à la France et à moi? Prince français, comment auriez-vous pu violer vos premiers serments, qui sont de maintenir l'égalité parmi vos peuples?" He adds that Louis will lose the love of the Dutch; "Car, si une noblesse est soutenable dans un pays militaire, elle est insoutenable dans un pays de commerçants. J'estime mieux le dernier boutiquier d'Amsterdam que le premier noble de Hollande."<sup>38</sup> But it is only in August of the same year

<sup>36</sup> *Corr.*, X. 205.

<sup>37</sup> *Ibid.*, XVI. 173.

<sup>38</sup> *Lecestre*, I. 90.

that Napoleon writes to Cambacérès with respect to a decree-project for the conferring of titles on the most important members of the electoral colleges; it is pointed out that "l'exécution de ce système est le seul moyen de déraciner entièrement l'ancienne noblesse. On s'appelle encore duc, marquis, baron; on a repris ses armes et ses livrées. Il était facile de prévoir que, si l'on ne remplaçait pas ces habitudes anciennes par des institutions nouvelles, elles ne tarderaient pas à renaître." Accordingly the decree, in the desire "effacer jusqu'au souvenir des anciennes distinctions et des anciens privilèges qui ont été réprouvés par nos constitutions et par nos lois", proceeds to the establishment of the hereditary titles of duke, count and baron.<sup>39</sup> After this step the Emperor was obliged to relax his opposition to the policy of Louis in Holland, though he repeats to him, May 6, 1808, that his measures are "fort inutile" and that he must draw the line at the creation of princes.<sup>40</sup> In 1810 in a note for the Imperial Arch-Chancellor he dwells on the advisability of the rapid development of the institution of hereditary titles in order that the new nobility may be really national, and repeats that the whole aim of the imperial policy in this matter was "donner des appuis à la dynastie présente, faire oublier l'ancienne noblesse".<sup>41</sup>

Only a few months later we find steps apparently taken to modify the work of Louis in Holland and to reconstruct the Dutch nobility on an imperial basis;<sup>42</sup> there are other indications of a new aim of developing an imperial nobility as distinct from national aristocracies, and it is probable that the difficulties and uncertainties of this policy largely account for inconsistencies in the later years. In a letter to Murat of November 20, 1809, Napoleon approves of a step recently taken by the Neapolitan government as likely to be "utile à votre royaume en régénérant sa noblesse et en entourant le trône de familles qui lui devront les distinctions dont elles seront revêtues".<sup>43</sup> But a year later he writes that Murat's idea of reconstructing the Neapolitan *noblesse* is ridiculous and that he is to keep it as it is.

J'ai dû reconstituer en France la noblesse, parce qu'il s'était élevé beaucoup d'hommes qui se sont illustrés dans toutes les carrières, civiles et militaires, soit au milieu des dissensions et factions, soit au milieu des camps. Ce que j'ai fait en France, et ce que l'Europe a approuvé, ce serait à Naples une singerie mal appliquée; laissez dormir cela. Quelque chose que vous fassiez, il n'est pas en votre pouvoir, avant que de grands événements illustrent votre pays, de faire oublier le passé et de faire dater les choses de l'époque actuelle.<sup>44</sup>

<sup>39</sup> *Corr.*, XV. 487.

<sup>40</sup> Lecestre, I. 190.

<sup>41</sup> *Corr.*, XX. 410.

<sup>42</sup> *Ibid.*, XXI. 265, 354.

<sup>43</sup> De Brotonne, *Dern. Lett.*, I. 447.

<sup>44</sup> *Corr.*, XXI. 333.

It is clear from these citations that the policy of Napoleon in regard to a titled aristocracy can be accurately weighed only after fuller examination. At present I am concerned only to point out that there is apparently nothing in this policy that casts doubt on the sincerity of his identification of himself and his régime with that uplifting of the non-noble classes that had been so manifest a result of the Revolution.

## II.

The other side of my subject is that of the legality or constitutionality of government in France in the Napoleonic epoch. The incompleteness with which the Napoleonic system and methods have as yet been presented is shown clearly by the haziness of our ideas on the exact treatment by Napoleon of the laws and the constitution. The ordinary assumption is, I think, that as this constitution and these laws were practically dictated by him, and as he had arrived at this position of dictatorship by a violent seizure of power, he continued to cast aside legal and constitutional restraints whenever it seemed desirable, and allowed the forms to have validity only when they did not trammel him. At the best, he is represented as being restrained only by the statesman's sense of the necessity of recognized limits and methods, and by the impulse to establish a government of order in contrast to the anarchy and arbitrariness of the preceding period.

Views of this sort are based largely upon the misrepresentations of his enemies after his fall; they find expression in the language in which the Senate that had been his chief tool demanded his abdication in 1814, or in the words of the pamphleteer who in 1815 charged him with substituting "*ta volonté aux lois*".<sup>45</sup> It is indeed easy to give to such a charge a large appearance of truth, and I have no intention of denying that Napoleon acted throughout in the conviction that the national sovereignty was deposited with him, and that its exercise could at any moment be extended by him to the constitutional documents themselves. Further there can be no question that through the police individuals were frequently arbitrarily deprived of the benefit of the law. But it will, I think, be found that most of these instances of arbitrary treatment of individuals or of classes (as in his taking the sons of leading families in France and in conquered countries as hostages), are in connection with the exceptional situations created by conspiracy or civil war, or are concerned with those whom, as officials, Napoleon regarded as having

<sup>45</sup> "*Le cri de la France, par un propriétaire de domaines nationaux.*" Arch. Nat., AD X. 21.

come into special relations with the administration or who were in a sense enjoying only a probationary citizenship (*e. g.*, the *émigrés*). The power given to the Senate to annul judgments of the courts when they were dangerous to the security of the state was very infrequently used; such a power, however, implies no more than the claim as to royal prerogative made and exercised by Charles I., and in neither the one case nor the other does it necessarily indicate any large degree of illegality or unconstitutionality in administration.

As a matter of fact, the student of the Napoleonic administration will, I think, be surprised at the tenderness shown by Napoleon for the constitution, at the vigor and consistency with which he lays stress upon strict adherence to the laws and the legal conditions of their application. He may be said indeed to pose as a champion of legality. We can credit him, I think, with acting on the conviction that while it was essential that he should have in reserve an unquestioned sovereign authority, this authority should remain in abeyance as far as possible, and government should normally be administered with rigid legality. It was in this temper that he wrote to Fouché, September 29, 1809: "Je reconnais toujours dans vos actes la même marche; vous n'avez pas assez de légalité dans la tête."<sup>46</sup> We find him frequently raising the question of the exact interpretation of the constitution, ordinarily to be sure on points of comparative unimportance. In a decision of August 15, 1804, he declines to use fully his constitutional opportunities to further administrative ends, and remarks, "L'Empereur ne désire faire usage de la faculté de sa prérogative que dans les circonstances d'une plus haute importance."<sup>47</sup> In the same year he brings forward a constitutional objection to a development he is usually represented as having much at heart. It is in the note to the Council of State quoted above on the project of making *maires* and their adjoints *ex-officio* part of the municipal councils. "Comment", he asks, "accorde-t-on cette mesure avec le droit de surveillance du conseil sur l'administration de la municipalité?"<sup>48</sup> A little later he shows that he is ready to push on centralization as far as the constitution will allow; a note of May 2, 1805, to the Minister of the Interior on the matter of making presentations for vacancies in a departmental council declares that "L'Empereur n'est restreint par aucune clause constitutionnelle lorsque le conseil n'est pas complet."<sup>49</sup> In 1806 he requests a report on the justice of the peace of a certain

<sup>46</sup> *Corr.*, XIX. 535.

<sup>47</sup> *Ibid.*, IX. 471.

<sup>48</sup> *Ibid.*, X. 36.

<sup>49</sup> *Ibid.*, X. 364.

commune and asks to be informed "si j'ai le droit de le destituer".<sup>50</sup> That at times he was willing to recognize limits even to the imperial prerogative would seem to be indicated by the remark in a "Note dictée par l'Empereur pour le Ministre de la Police, du 13 Juin, 1810", with regard to Frenchmen who had served foreign powers against France, that "la loi est tellement précise et puissante qu'une décision même de l'Empereur ne pourrait les soustraire à son application."<sup>51</sup>

The rights of the subject are frequently upheld by the Emperor against official tendencies to ignore or diminish them. He writes to Fouché, March 5, 1807, with respect to an alleged illegal tax by a prefect: "Faites un rapport au Conseil d'État, pour qu'il soit pris des mesures sur cet objet, car enfin aucune taxation ne doit être faite sur les citoyens que par une loi."<sup>52</sup> In 1809 there came to a head the very important and long-undetermined question of the conditions of the expropriation by the state of private property; the vigor with which the Emperor defends private right against administrative encroachment is quite remarkable. August 21, 1809, he writes to Régnier, Grand Judge, that he had received many complaints about administrative abuse in this matter, and wished the subject investigated in the interests of the security of private property; "il est indispensable", he says, "que les tribunaux puissent informer, empêcher l'expropriation et enfin recueillir les plaintes et garantir le droit des propriétaires contre les entreprises de nos préfets, des conseils de préfecture et autres de nos agents, sous quelque dénomination."<sup>53</sup>

Two weeks later, on receiving the report from Régnier, he writes to Cambacérès to protest against Régnier's declaration that, while "expropriation forcé" without indemnity was a violation of the Code Napoleon, there was under the law no means of punishing officials for such a procedure, and demands that such punishment be

<sup>50</sup> *Ibid.*, XIV. 19.

<sup>51</sup> Arch. Nat., AD IV. 909.

<sup>52</sup> *Corr.*, XIV. 372.

<sup>53</sup> *Ibid.*, XIX. 376. It would seem as if this matter of expropriation had been long in an unsettled condition. At first the tendency seems to be to put it fully under administrative control, for the "Procès-verbal des Séances du Conseil d'État" of the 8 Floréal an X. (Arch. Nat. AF\* IV. 6) contains the following entry: "Le Ministre de l'Intérieur présente un Rapport sur la question de savoir si le droit d'expropriation forcé peut être donné aux Préfets par une autorisation du Gouvernement, sans qu'il soit besoin d'une loi." The report was recommitted. It would seem consequently that notwithstanding the advance of the power and absoluteness of the new régime there is to be remarked here a decided gain in legality; in 1809 the question is not whether the prefect can act without law, but whether he can be trusted to apply the law.

provided for. He declares that expropriation, as the acquisition of property, can be accomplished only through judicial channels, and that "je ne voudrais faire aucune différence pour l'administration." "Nos lois", he adds, "me paraissent un assemblage de plans mal assortis, inégaux, irréguliers, laissant entre eux de fréquentes lacunes, et j'attache une grande importance à joindre ces différents éléments, à n'en faire qu'un tout, afin de réprimer les abus de l'administration, qui, dans un si grand empire, peuvent être plus fréquents."<sup>54</sup> Nearly a month later he returns to the subject and informs Cambacérès that he is not satisfied with his memoir on the subject, that the interests of expeditious administration is not a valid objection to the leaving of the process to the courts, and that the legislative section of the Council of State is to prepare a project of law on this principle.

The consciousness shown by Napoleon in this matter as to the dangers of bureaucratic tyranny is frequently evident; especially does he seem to have been apprehensive of the power of the prefect. In 1801 the Minister of the Interior is informed that as some prefects "se croient autorisés à interpréter les actes du Gouvernement", as by extending the provisions of *arrêtés*, a general order is to be issued that when not given special latitude they must conform literally.<sup>55</sup> In 1806 a difficulty occurred between the *maire* of Dijon and the prefect of the department, and the Emperor writes to Champagny that the prefect has acted without tact or judgment.

La subordination civile n'est point aveugle et absolue; elle admet des raisonnements et des observations, quelle que puisse être la hiérarchie des autorités. . . . Les préfets ne sont que trop enclins à un gouvernement tranchant, contraire à mes principes et à l'esprit de l'organisation administrative. . . . L'autorité des préfets est trop considérable; il y a à en craindre l'abus plus que le relâchement; et, à cette occasion, vous ferez une circulaire aux préfets, pour leur faire connaître que je n'entends pas qu'ils impriment aucun arrêté contre les officiers municipaux et leurs subordonnés. C'est vous qui êtes juge des faits d'administration, et non la ville ou le département.<sup>56</sup>

March 7 of the following year, he writes to the president of the Section of the Interior of the Council of State with regard to an order by a military commander against citizens bearing arms (an order which is disapproved as beyond the official's power) that it is the aggressions of the prefects that have encouraged the military officials to such steps, and that such power could not be given even to the prefects since it would be to entrust them with such an au-

<sup>54</sup> *Corr.*, XIX. 438.

<sup>55</sup> *Ibid.*, VII. 29.

<sup>56</sup> *Ibid.*, XII. 311.

thority that "Le repos et la liberté des citoyens dépendront donc de l'exagération ou de l'arbitraire d'un simple administrateur." And, he adds, "Un intendant de département n'est point un vice-empereur; il n'a qu'une portion de l'administration générale; il n'a d'autre devoir que celui de procurer l'exécution des lois et des règlements."<sup>57</sup> On another occasion he points out that the prefects were not judicial officials as were the old intendants.<sup>58</sup>

It is, of course, undeniable that a good deal of the jealous watchfulness that Napoleon directs toward his officials springs from the instinct of the organizer, the good business administrator, from a sense of the necessity of maintaining the division of labor and of seeing that the different parts of the machine are occupied with the functions appropriate to them. It is perhaps primarily this point of view that he has when in 1806 he roughly admonishes his brother Louis of the necessity of keeping civil and military administration distinct. Louis had presumed in his capacity of Grand Constable to give orders in France; "Vous n'entendez rien", the Emperor tells him, "à l'administration civile, et la France ne marche pas ainsi. . . . L'administration militaire n'a rien à démêler avec l'administration civile. Si vous gouvernez ainsi votre royaume sans aucune division d'autorité, ce sera un vrai chaos."<sup>59</sup>

But, ordinarily, much more than this was in the Emperor's mind, and it is worth pointing out that he constantly enforced upon the military profession a respect for civil life and interests that in that age were only too easily forgotten. While on one occasion he writes to Fouché that the butcher who had insulted a soldier must be severely punished, as "L'excès auquel il s'est porté est le plus grand crime que puisse commettre un citoyen",<sup>60</sup> almost all his references to these relations show his solicitude in the other direction. I have pointed out above his defense of the civil right to bear arms against military prohibition, as also his strong disapproval in 1804 of the intimidating attitude of a military commander in regard to an electoral college. The superiority under normal conditions of the civil authority is consistently enforced, as when he writes to Maréchal Moncey that the *gendarmerie* must be "à la disposition des préfets, comme supérieurement chargés de la police des départements", that for it to be under military control would prevent unity and order.<sup>61</sup> In 1808 he writes to Fouché with refer-

<sup>57</sup> *Corr.*, XIV. 401.

<sup>58</sup> *Ibid.*, XIX. 438.

<sup>59</sup> *Lecestre*, I. 79.

<sup>60</sup> *Corr.*, XI. 10.

<sup>61</sup> *Ibid.*, X. 279.

ence to some outbreaks on the part of the cadets of the military academy at Metz that "le premier devoir de ces jeunes gens est le respect à l'autorité civile."<sup>62</sup>

The question of the legality of Napoleon's temper and administration is not to be completely or satisfactorily dealt with without following in some degree his relations with the judiciary, his conduct with respect to the application of the law in individual cases. If he had the courts sufficiently in his power he could afford to frown upon administrative disregard of the law; if he interfered with the application of the law by the courts it would evidence an even more illegal and dangerous attitude than any degree of support to administrative independence of the law. An intelligent government, we may suppose, is led into arbitrary courses only when the courts (as well as the legislature) are inconveniently independent, and it cannot rely on being able to secure judicial modifications and exceptions. Possession of the power of securing such judicial exceptions and modifications is further manifestly a relative matter; every executive is vested with more or less pardoning or commuting power and is thus regularly possessed of a large measure of judicial authority.<sup>63</sup>

The temptation for the executive power to interfere with the courts will depend further on the degree in which the executive is vested with legislative control and with means of pressure on judges; a government that monopolizes legislative initiative and can pass the laws it wants, or which can intimidate the judges through the power of dismissal, manifestly can afford to allow a more or less free course to the ostensible operations of the courts.<sup>64</sup> But these

<sup>62</sup> *Corr.*, XVII. 119.

<sup>63</sup> That this ordinary executive power was recognized in the Napoleonic régime as being under restraint is shown by the following entry from the "Procès-verbal de la Séance Extraordinaire des Consuls, du 10 Nivose an VIII": "il est fait lecture d'un mémoire relatif aux individus déportés et condamnés pour opinions politiques. Renvoyé à la section de législation du Conseil d'État, pour examiner si pour appliquer à ces individus l'amnistie ou le pardon individuel le gouvernement a besoin de l'autorité de la loi." Arch. Nat., AF IV. 911.

<sup>64</sup> The Napoleonic judges were appointed for life, though after 1807 a probationary period of five years was required. How far the early government was from assuming a complete control of the judiciary is indicated by some extracts from the "Procès-verbaux des Séances des Consuls" of 1801. On the 2 Frimaire we read: "on renvoya au Conseil d'État, section de la législation, l'examen de la question suivante: dans un pays mis hors de la constitution par une loi, le Gouvernement peut-il interdire les juges et en nommer d'autres?" On the 9 Frimaire the Secretary General of the Conseil d'État presented "une décision du Conseil d'État portant que dans les lieux où l'empire de la constitution est suspendu le Gouvernement peut suspendre, mais non destituer les juges." Arch. Nat., AF IV. 911.

distinctions do not perhaps carry us very far, especially in the case of a government with indefinite prerogative; the present question is as to whether Napoleon were an arbitrary or a legal despot, whether he did or did not recognize the Reign of Law as well as a division of powers, to what degree he conceded rights to the subject and left unimpeded the enforcement of these rights by the courts. The foregoing pages have shown that he did recognize such rights and did attempt to prevent administrative encroachment on them; it will be found that he did also repel any interferences with the judiciary on the part of administrative officials, and was but rarely guilty of such interferences himself.<sup>65</sup>

In scrutinizing this part of the Napoleonic régime it must be conceded that in an even greater degree than with respect to other parts, the right to make general assertions depends upon an exhaustive tracing of the course of justice. Such an examination is perhaps impossible and certainly is not claimed here; a large amount of material, however, has been used, and, as it extends over the whole period, it seems reasonable to treat it as representative. The instances of references or appeals by Napoleon to his constitutional relations to the courts are numerous, and, while they show him at times anxious to make the most of his powers, they rarely indicate an effort to overstep them.

I will take up the most significant of these instances chronologically. In 1800 he requests from the Minister of Justice "un rapport sur la manière dont on pourrait faire casser le jugement qui condamne seulement à six ans de fers les trois assassins du courrier de Nantes, pris en flagrant délit".<sup>66</sup> The government was at this time desperately contending with brigandage, and interference with the judgment might well have seemed essential. A still more exceptional situation was presented by the conspiracies so frequently discovered or suspected, and the method in which exceptional measures were taken in regard to them is indicated by the following extract from the deliberations of the Conseil d'État of the 11 Nivose an IX. The Minister of Police had demanded exceptional measures against certain conspirators; in reply, the council

<sup>65</sup> One side of the relations between the judicial and administrative officials is dealt with in the "Avis du Conseil d'État sur la Correspondance des Magistrats . . . avec le Maires et les Commissaires de Police", of August 26, 1806; this contains the statement that the interference of the prefects is "très-contraire à l'ordre public", and that "si les municipaux comme administrateurs ne sont comptables de leurs faits qu'à l'administration supérieure, il sont comme officiers de police, sous la surveillance et l'autorité immédiate des magistrats des cours de justice criminelle." Arch. Nat., AD I. 86.

<sup>66</sup> *Corr.*, VI. 480.

considers whether such a step should be "un acte de haute police du Gouvernement ou être convertie en projet de loi", and resolves that the council

est d'avis que l'acte de haute police dont il s'agit, n'est pas de nature d'être l'objet d'une loi. Néanmoins, le conseil, considérant que cet acte étant un acte extraordinaire et ayant pour objet le maintien de la constitution et de la liberté publique, est, pour cela même, de la compétence spéciale d'un corps qui, par l'esprit de son instruction, doit veiller à tout ce qui intéresse la conservation du pacte social; que d'ailleurs, dans un cas comme celui-ci le référé du Gouvernement au Sénat conservateur, pour provoquer sur ses propres actes l'examen et la décision de ce corps tutélaire, devient, par la force de l'exemple, une sauve-garde capable de rassurer, pour la suite, la nation, et de prémunir le gouvernement lui-même contre toute acte dangereux à la liberté publique, est d'avis que cet acte du Gouvernement. . . doit devenir la matière d'un Sénatus-consulte prononçant sur la question de savoir si cette mesure est conservatrice de la constitution.<sup>67</sup>

The act in question was the transportation of 131 accused. This procedure, of course, brings forward the question of the degree in which the Senate, by virtue of its discretionary power of annulling judgments in the interests of the public security, was manipulated as a means of setting aside judicial restraints. It can, I think, be confidently asserted that the Senate was used in this way only under the most exceptional conditions and when there was at least some color for the idea that the safety of the state was involved.<sup>68</sup>

In 1801 we find Napoleon directing the Minister of the Interior to make a report as to whether the justices of the peace must be residents of their districts;<sup>69</sup> he was strongly opposed to such a restriction but apparently does not think of overriding it. To this institution (which remained elective till 1802), he shows himself hostile from the first, and he soon proceeds to modify it by law. April 7, 1802, he writes to the Minister of Justice that, as the nominations of the justices have been very bad, and, as the constitution says that they should be elected by the people, "il convient, pour y remédier, de prendre des mesures qui paraissent efficaces, et qui seraient de les réduire à leurs fonctions de conciliation et de ne pas les payer."<sup>70</sup> But as late as the end of 1806 he was still evidently scrupulously respecting the institution, for December 2 we find him requesting from the Minister of Justice a report on the justice of

<sup>67</sup> Arch. Nat., AD I. 86.

<sup>68</sup> It will be remembered that a prominent place was given to a senatorial commission appointed to safeguard the liberty of the subject. Of its work I have as yet no records.

<sup>69</sup> *Corr.*, VII. 321.

<sup>70</sup> *Ibid.*, VII. 431.

a certain commune, and "que vous me fassiez connaître si j'ai le droit de le destituer".<sup>71</sup> Napoleon, doubtless, mainly disliked the direct popular nomination of these officials, and he soon did away with it; on the other hand, we find him constantly upholding trial by jury. There were occasional suspensions of the jury in localities where public sentiment was suspect and political issues likely to appear; but, as late as June 24, 1808, he writes with respect to the Westphalian constitution: "On peut supprimer le jury d'accusation, mais il faut maintenir le jury de jugement dans son intégrité; il le sera en France, parce que c'est une bonne chose et que la nation le désire."<sup>72</sup> He remarks at the same time that while the Italians are now "trop passionnés" for the institution, "aussitôt que le nouveau système français sera conçu, je l'adapterai de même à l'Italie", and adds with respect to the opponents of the institution, "Ceux qui veulent la publicité sans jury et sans appel disposent légèrement de la vie des hommes."

We have above seen Napoleon seeking in 1800 means of setting aside a too moderate judgment; in July, 1803, he responds to the request of a prefect for the punishment of an individual wrongfully acquitted, that "La déportation ne peut point être ordonnée, cet individu ayant été acquitté."<sup>73</sup> In 1805 the Minister of Justice is informed that the Emperor is very dissatisfied with the tribunals and with the *procureurs généraux*; and it is intimated that steps may be taken against one of the latter, for "si je ne suis point maître des tribunaux, je le suis de la nomination de mes procureurs généraux."<sup>74</sup> In 1809 Régnier is directed to express the imperial satisfaction with the officials of the criminal court of Rouen for resisting pressure to show favor to criminals of distinguished family; "La loi", Napoleon says, "est une pour les citoyens, et la considération de la naissance et de la fortune ne peut jamais être, pour Sa Majesté et les magistrats, un motif pour faire fléchir la justice et même pour faire grâce; au contraire, elle rend ceux qui les commettent d'autant plus coupables qu'ils ont un rang distingué dans la société."<sup>75</sup>

There are indeed indications that toward the end Napoleon was tending to assume a higher hand with reference to the judiciary. A *sénatus-consulte* of October 12, 1807, makes provision for a period of probation for judges before life-appointment, and for an examination of the lists of existing judges to eliminate the unworthy. By

<sup>71</sup> *Corr.*, XIV. 19.

<sup>72</sup> *Ibid.*, XVII. 328.

<sup>73</sup> *Ibid.*, VIII. 407.

<sup>74</sup> *Ibid.*, XI. 27.

<sup>75</sup> *Ibid.*, XVIII. 204.

this it was reserved to the Emperor "de prononcer définitivement sur le maintien ou la révocation des juges désignés dans le rapport de la commission".<sup>76</sup> In November, 1810, the Emperor sends to Cambacérès a proposition that "les ministres d'État, qui sont les vétérans de l'administration . . . fussent conseillers honoraires des cours impériales";<sup>77</sup> that their participation was to be more than honorary is shown by the remark that the presence of such men as Treilhard and Regnaud would be very advantageous in an important impending case. But it is evident that this idea, if at all definite, had a limited and political bearing, and can scarcely be supposed to indicate any intention of tampering with the ordinary administration of justice in France.<sup>78</sup>

The only instance of direct interference with the courts disclosed by the material used<sup>79</sup> is with regard to an imperial court at Antwerp in 1813, in a case in which the city (or rather the departmental administration) had failed in a prosecution of alleged corrupt *octroi* officials. Napoleon writes, August 5, to Cambacérès that the affair is "un scandale public", and, August 14, says that "Aux circonstances extraordinaires il faut des mesures extraordinaires; nos constitutions y ont pourvu." On the same day he writes to the Minister of Justice of the shameful corruption shown by the jurors, and proceeds, "Dans cette circonstance, quoiqu'il soit dans nos principes et dans notre volonté que nos tribunaux administrent la justice avec la plus grande indépendance, cependant, comme ils l'administrent en notre nom et à la décharge de notre conscience, nous ne pouvons pas ignorer et tolérer un pareil scandale, ni permettre que la corruption triomphe et marche tête levée dans nos bonnes villes de Bruxelles et d'Anvers." The Minister is, therefore, to order proceedings

<sup>76</sup> Arch. Nat., AD I. 44.

<sup>77</sup> *Corr.*, XXI. 269. The *cours impériales* were the courts of appeal.

<sup>78</sup> In a "Note dictée par l'Empereur pour le Grand Juge, Ministre de la Justice" of December 11, 1810 (Arch. Nat., AF IV. 909), we find the following order: "Le Grand Juge fera mettre en accusation sur les nouvelles charges l'homme qui ayant blessé un gendarme qui en perdu la jambe a été acquitté par le tribunal de Namur. Aussitôt que le Directeur du jury aura décerné le mandat, le Grand juge ordonnera que la procédure soit envoyée à Paris, et en rendant compte de le Renvoi il proposera de traduire le prévenu devant une commission militaire, attendu que le gendarme blessé était connu pour gendarme par son assassin, que le jury est soupçonné de corruption, et qu'il s'agit d'un pays nouvellement français." This procedure seems unquestionably arbitrary; and it will be remembered that earlier Napoleon had seemed solicitous to keep the police free of military authority. But there is some doubt as to whether this order were really dispatched. It does not appear either in the *Correspondance* or in the *Supplements*.

<sup>79</sup> It is rather noticeable that the official publication of the *Correspondance* makes no reference to this affair; the letters to Régnier and Cambacérès are to be found in *Lecestre*, II. 277-283.

against the jurors, the suspension of the judgment and the re-arrest of the accused; then "en vertu du paragraphe 4 de l'article 55 du titre V des Constitutions de l'Empire, en date du 4 août 1802", he is to present to the Council of State "un projet de sénatus-consulte, pour annuler le jugement . . . et renvoyer cette affaire à notre Cour de cassation, qui désignera une cour impériale par-devant laquelle la procédure sera recommencée et jugée, les chambres réunies et sans jury." It will be noticed that though the Senate had power to issue a *sénatus-consulte* of this nature, the Emperor was straining his prerogative in imposing on it and on the courts a definite course of procedure, involving suspension of jury-trial. This incident, however, was in every way exceptional, and involved peculiar features of the French administration in Belgium; the Emperor's indignation was based upon police-reports, and seems to be aroused mainly in the interests of the people of Antwerp. The case was referred to the court of appeal of Douai, but the Empire had fallen before a decision was rendered.<sup>80</sup>

I shall not attempt to add any further reflections to the foregoing recital of evidence. More extended investigation will very probably modify the preliminary conclusions indicated above; but it does not seem premature to maintain that Napoleon Bonaparte recognized his government to be based upon the Revolution, that he administered France for the most part in harmony with revolutionary principles and results, and that as compared with both the Revolution and the Old Régime his administration was distinguished by a respect for law. He claimed to be invested by the popular will with absolute but responsible power for the organization of the state, for the using of its resources in the general welfare, and for its defense against its enemies; but he respected his own organization, normally treated the law and the constitution as inviolable, and protected the well-defined liberties and opportunities of the citizen. These liberties and opportunities were in truth subject to such far-reaching restrictions as were involved in the strict censorship of the press and the prohibition of political agitation; but it might not be easy to meet adequately the defense that we may suppose Napoleon would make in pointing out that the effects of the previous license demanded at least a period of restraint.

VICTOR COFFIN.

<sup>80</sup> See *Revue des Questions Historiques*, LVI. 248-271, "Un Préfet Indépendant sous Napoleon. Voyer d'Argenson à Anvers."